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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JASON ROY MERRIETT, Appellant.	2 CA-CR 2011-0071 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093669001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Jason Merriett was convicted after a jury trial of kidnapping, a class two felony, and was sentenced to a mitigated four-year term of imprisonment. On appeal, Merriett contends: (1) the state presented insufficient evidence to support his conviction for kidnapping; (2) he "is entitled to a reduction in [the] classification of his offense" to a class four felony pursuant to A.R.S. § 13-1304(B), because he released the victim voluntarily and unharmed; and (3) he was denied his constitutional right to a jury determination of facts essential to his conviction for a class two felony. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury verdict and resolve all reasonable inferences against Merriett. *State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978). In September 2009, T.H. was attending classes at Pima Community College. One evening, during a break from her psychology course, T.H. was in the handicapped stall of the women's restroom when she heard a noise above her. She looked up and saw a man—later identified as Merriett—looking into her stall from above.

¶3 Merriett then stepped down from the toilet in the adjacent stall and crawled underneath the door and into T.H.'s stall. Once inside, he "got up to his feet and grabbed [T.H.] and turned [her] around so [her] face was against the stall divider" and held her there. He covered her face and mouth with his arms and told T.H. to "shut the fuck up" in an "[a]ngry, aggressive" manner. He pushed T.H. to the [floor] and "kept grabbing [her] back" whenever she tried to escape. He got on top of T.H. and held her down as he grabbed her legs, reached up her dress, and tried to remove her underwear.

¶4 A man and woman heard T.H.'s screams, entered the restroom, and asked if everything was okay. Merriett let go of T.H. after the two entered the restroom, and T.H. immediately got up and ran out. By that time, a small crowd had gathered in the area outside the restroom. T.H. had injuries to her mouth and bruises on her face, and her neck was "very badly hurt for weeks after."

¶5 Merriett was told by a campus dean to wait at the scene until police arrived. He was subsequently placed under arrest and later charged with attempted sexual assault and kidnapping. The jury found Merriett guilty of kidnapping, but it acquitted him of the attempted sexual assault charge and found the state had not proven the kidnapping was sexually motivated. Merriett was sentenced as outlined above, and this appeal followed.

Discussion

Sufficiency of the Evidence - Intent

¶6 Merriett first contends the state presented insufficient evidence to sustain his conviction for kidnapping. He concedes the evidence established that he restrained the victim, but argues it did not show he intended to commit any of the acts required for the commission of the offense pursuant to A.R.S. § 13-1304(A). He argues that absent "probative evidence" of his intent, his conviction must be reduced to the lesser-included offense of unlawful imprisonment, a class six felony.

¶7 On appeal, "[w]e review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of

defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Evidence sufficient to support a conviction can be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). We will reverse "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶8 Section 13-1304(A) provides in pertinent part:

> A person commits kidnapping by knowingly restraining another person with the intent to:
>
> . . . .
>
> 3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony; or
>
> 4. Place the victim or a third person in reasonable apprehension of imminent physical injury to the victim or the third person . . . .[1]

The trial court instructed the jury on all the elements of kidnapping, including the requisite mental states that would support a conviction. The jury was instructed that "[i]ntentionally or with intent . . . means that the defendant's objective is to cause that result or to engage in that conduct."

¶9 Merriett maintains the state provided no evidence he intended to inflict death, physical injury, or a sexual offense, or that he intended to place T.H. in reasonable apprehension of imminent physical injury. And, because the jury found the kidnapping was not sexually motivated and acquitted him of attempted sexual assault, Merriett

[1]Subsections 13-1304(A)(1), (2), (5), and (6) are not relevant to this appeal.

claims his conviction must have been based on either or both of the two remaining theories—intent to inflict physical injury or intent to place the victim in reasonable apprehension of imminent physical injury. He asserts that of these two theories, the state offered evidence to support only the latter, and that it introduced nothing that could serve as circumstantial evidence sufficient to support a conviction as to either. We disagree.

¶10 The evidence amply supported the jury's determination that Merriett had the requisite intent to find him guilty of kidnapping. The jury reasonably could infer Merriett's intent from his conduct and statements, as described in T.H.'s testimony. And it was not until after two people heard T.H.'s screams and entered the restroom that Merriett finally let go of her.

¶11 At a minimum, this evidence was sufficient to show that Merriett had intended to place T.H. in reasonable apprehension of imminent physical injury. "It is not necessary for the accused to have verbally expressed [his] intent . . . since . . . intent is a state of mind which is seldom, if ever, susceptible [to] proof by direct evidence . . . ." *State v. Lester*, 11 Ariz. App. 408, 410, 464 P.2d 995, 997 (1970). A "[d]efendant's conduct and comments are evidence of his state of mind." *State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983). We therefore reject Merriett's argument that there was no circumstantial evidence of intent. His actions, statements, and demeanor are strong circumstantial evidence of his intent and sufficient to support his conviction. *See Lester*, 11 Ariz. App. at 411, 464 P.2d at 998 ("The question of whether the defendant had the requisite intent was one for the jury and only if the facts afforded no ground for such inference was it permissible for the trial court to determine that no such intent existed.").

Trial Issue – Voluntary Release

¶12 Merriett next argues he is entitled to a reduction in the classification of his offense to a class four felony because "he released [T.H.] voluntarily without physical injury before arrest and before accomplishing any of the enumerated offenses in the kidnapping statute." *See* § 13-1304(B). Because, as Merriett acknowledges, he did not make this argument in the trial court, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. But "[b]efore we . . . engage in a fundamental error analysis . . . we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶13 Section 13-1304(B) provides in pertinent part:

> Kidnapping is a class 2 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place before arrest and before accomplishing any of the further enumerated offenses in subsection A of this section in which case it is a class 4 felony.

Contrary to Merriett's argument, the state is not required to disprove the factors described in subsection (B) of the statute as part of its case-in-chief. In *State v. Eagle*, our supreme court held "[s]ubsection A of [§ 13-1304] completely defines the crime of kidnapping as it exists in Arizona" and it requires "a knowing restraint coupled with one or more of the specifically listed intentions." 196 Ariz. 188, ¶ 7, 994 P.2d 395, 397 (2000). The court rejected the defendant's argument that the state had the burden of proof with respect to

subsection (B) and found that "it is proper to place the burden of proving [subsection (B) factors] on the defense." *Id.* ¶ 17.

¶14 Thus, to be entitled to a reduction from a class two to a class four felony, Merriett bore the burden of proving by a preponderance of the evidence that he released the victim (1) voluntarily; (2) without physical injury; (3) in a safe place; (4) prior to arrest; and (5) before completing an enumerated act. His failure to prove any one of the five factors nullifies the defense. *Id.* ¶ 12; *see also State v. Tschilar*, 200 Ariz. 427, ¶ 26, 27 P.3d 331, 338 (App. 2001).

¶15 Merriett contends that regardless of whether the burden was his or the state's, the factors in § 13-1304(B) were established. He maintains that he released T.H. voluntarily and that the injuries she sustained were not "physical injur[ies]" within the meaning of A.R.S. § 13-105(33). First, we reject Merriett's argument that he "released the victim voluntarily." He released T.H. only after two individuals came to her assistance in response to her screams for help. *Cf. State v. Whitney*, 159 Ariz. 476, 486, 768 P.2d 638, 648 (1989) (evidence defendant did not release victim until approached by three men sufficient to show release not voluntary). Second, even assuming T.H. had been released voluntarily, she was not released "without physical injury." "'Physical injury' means the impairment of physical condition." A.R.S. § 13-105(33). To "impair" means "to damage or make worse by." *Webster's Ninth New Collegiate Dictionary* 603 (1983). T.H. had injuries to her mouth and bruises on her face, and "[her] neck was very badly hurt for weeks after." The evidence established T.H. was physically injured.

¶16 And in any event, as we noted above, there also was substantial evidence from which the jury could reasonably infer Merriett had placed T.H. in reasonable apprehension of imminent physical injury. In support of his argument to the contrary, Merriett points to the following testimony given by T.H. at trial: "I was afraid that he was going to rape me in the bathroom," and "I distinctly remember feeling like I'm going to get raped right now and no one is going to hear me and come in, and I'm doomed, and I felt like he was going to kill me." We are unpersuaded by Merriett's argument that this testimony established that "at no time did [the victim] articulate or even suggest that her fear was that Mr. Merriett would cause her physical injury." Because Merriett already had accomplished at least one of the acts enumerated in § 13-1304(A) before T.H. was able to get away, § 13-1304(B) does not apply. We find no error, fundamental or otherwise.

Alleged *Apprendi*/*Blakely* Violations

¶17 Merriett next argues he "was denied his right to a jury trial to determine the fact whether the victim was released unharmed." Because he did not object to the jury instructions or the verdict forms and did not otherwise raise this issue below, we review this claim for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608. To obtain relief under this standard, Merriett must first prove error. *Id.* ¶ 23.

¶18 In *Eagle*, our supreme court held that because it is "a mitigating factor relevant solely for sentencing purposes," a defendant bears the burden of proving voluntary release under § 13-1304(B). 196 Ariz. 188, ¶ 17, 994 P.2d at 399. But Merriett argues *Eagle*, and cases following it, no longer can be "reconciled with the

United States Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), [and he] should have been entitled to a jury finding on whether [T.H.] was voluntarily released unharmed." Merriett's reliance on *Apprendi* and *Blakely* is misplaced.

¶19 The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Blakely*, the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . without* any additional findings." 542 U.S. at 303-04 (citations omitted). In Arizona, "the statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence established" by statute. *State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005). And contrary to Merriett's argument, nothing in *Apprendi* or *Blakely* requires the state to disprove the existence of the § 13-1304(B) factors to convict him for kidnapping as a class two felony.

¶20 In *Tschilar*, this court was presented with the same question we are confronted with here: "[W]hether *Apprendi* requires that the issue of a victim's safe release as set forth in . . . section 13-1304(B) be resolved by the jury as an element of the offense of kidnapping," notwithstanding our supreme court's holding in *Eagle*. *Tschilar*, 200 Ariz. 427, ¶ 15, 27 P.3d at 336. We concluded that "*Apprendi* is not implicated in

the execution of" the kidnapping statute because a "[c]onviction by a jury for kidnapping pursuant to section 13-1304(A) authorizes the trial court to sentence a defendant for the commission of a class 2 felony." *Id.* ¶ 19. Our conclusion was based on the following reasoning:

> A determination that the kidnapping victims were released unharmed as defined by section 13-1304(B) simply leaves the range of punishment unchanged or reduces the range to that of a class 4 felony. Thus, the fact of release as found by the court does not expose a defendant to a punishment exceeding that permitted by the verdict; it only offers the possibility of a punishment less than that allowed by the verdict. The resolution of the question whether a victim was safely released has no bearing on the jury's determination that the offense of kidnapping had been committed.

Id. And we noted "*Apprendi* itself suggested that its rule does not apply to a statutory scheme like that of Arizona." *Id*. ¶ 20. "[A] legislature may devise sentence classifications dependent upon certain factors within a set range, the purpose being to avoid 'penal statutes that expose *every* defendant convicted of [a particular offense] to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime.'" *Id*., *quoting Apprendi*, 530 U.S. at 490 n.16 (alteration in *Tschilar*) (emphasis in *Apprendi*). The reasoning in *Tschilar* remains sound and Merriett has provided no basis for us to depart from its holding now.

Disposition

¶21 For the reasons set forth above, Merriett's conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge